IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY,
as Trustee, *Appellant*,

vs.

THE CITY OF TACOMA, *Appellee.*

No. 2601

# APPELLEE'S ADDITIONAL ANSWER BRIEF.

(Filed Under Stipulation).

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, CUSHMAN, D. J.

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Not having had appellant's brief at the time of the preparation of its original brief, appellee, under the stipulation on file, desires to say a few words in answer to the points made by appellant.

No argument will be wasted in attempting to combat appellant's endeavor to overthrow the construction which the Supreme Court of Washington in *Tacoma Railway & Power Company vs. Tacoma* put upon the statutes of that State. If the clear cut opinion of Judge Gose does not carry complete conviction on the point no argument we could make would do so.

It was there settled that the City had the power to make the contract it did make, and that the Public Service Act in no way affected either the contract or the conditions under which the Tacoma Railway & Power Company accepted it; and the only question remaining for all parties is whether the contract is to be carried out as it was written.

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## APPELLANT'S CASE.

To uphold itself in its at least doubtful positions the Tacoma Railway & Power Company resorted to the courts of its own selection and was unsuccessful.

Then, pending a petition for rehearing in the Supreme Court, it attempted to sell and, so far as it could do so, undoubtedly did sell all of the poles, wires, etc. constructed and used under its former franchise to the Puget Sound Traction, Light & Power Company, which asserted its claim to them by suit against the City in the U. S. District

Court but without success. (Trans. of Testimony, p. 20 *et seq.*)

Now comes in appellant: and what is its position?

It claims to be a mortgagee of the franchise and the property connected with operations under it.

But if it is a mortgagee its rights are all subordinate to the terms of the contract made by its mortgagor. It legally knew that if its mortgagor did certain acts or neglected or refused to do others, a forfeiture could be enforced against both of them, and nothing the mortgagee could do could avoid it.

In one place in its brief it complains that it had no notice of what its mortgagor was doing or not doing. But whose business was it to tell it of these shortcomings? As a trustee it might be supposed to keep up a show of watchfulness over such matters.

The doctrine of notice hardly covers such a case.

Moreover, the City had no knowledge of any mortgage.

The brief gives a lot of extracts from Manager Bean's talk and letters but to correct the effort at producing a false impression we cannot take the space for other citations. What we ask is a per-

usal of the testimony contained in the printed record, whereupon we prophesy the following general finding of facts, viz:

The Tacoma Railway & Power Company was determined to hang on to the lighting business as long as possible, notwithstanding the terms of its franchise and the City's notice to quit.

Its idea that it was free of the franchise prohibitions was newly born; for, in the first place, it procured the permits provided for, and secondly, when it entered into its contract with the Northern Pacific Company it provided against the contingency which it knew might arise if the City should revoke its permits. In paragraph XIII. of the contract (See Exhibit 3,) it was written:

> "Should the Power Company, by reason of its franchise be unable at any time to furnish the current for lighting, then the Railway Company may at its option terminate this contract by giving to the Power Company written notice of its election so to do."

Its agents went to the City Hall to "feel out the situation". The Council was the only place to apply for any modification of the resolution or other action because it had taken over the entire matter and could rescind the resolution, amend the franchise, or do anything else it saw fit. But they did not go there. They saw Lawson, Commissioner of Light & Water, but he told them it was a legal

question and he had nothing to do with giving concessions, and took them to the City Attorney, who advised the same thing (Record, p. 82). They suggested that the City should commence a suit to test the points they were raising but were informed that the City had no suit to bring, as the ordinance was definite and clear to to what should be done; and that if there was any suit the Company would have to bring it on (Record, pp. 83, 91). The agents proposed a sort of truce, by letters signed by the manager and intended to be signed by the City's Commissioners of Light and Water and Public Works; but the signatures were refused. But in spite of all rebuffs the manager seems to have continued in a most cheerful and imaginative mood, for he construed the whole performance represented by the adoption of the two resolutions as nothing but a "threat", with no intention to carry it out—a wholly vain and undignified sham.

That is all except that it is said the City Attorney said that there was no desire to forfeit the franchise. Well, there was none; and with the protection which the ordinance gave by requiring thirty days' notice it was never supposed that the right to forfeiture which was initiated by the failure of the Company to stop the lighting business April 15th would be allowed to ripen, nor that the Company would drive the City into claim-

ing a forfeiture as a measure to enforce the terms of the ordinance prohibiting the lighting business.

Whose fault was it that it did so ripen, or that the measure forced upon the City was taken advantage of?

Such are all the facts upon which appellant seeks to base an estoppel against the City of Tacoma (Brief, p. 31).

Appellant cites a page or more of cases to sustain the general proposition that forfeitures are not favored, etc. (Brief, p. 35-41), the most of which have no relevancy, as they are mere instances of sales of real estate upon condition or covenant.

Cases like this one, where the terms and conditions of forfeiture are clearly expressed in a contract, rarely get into the books, since nobody is hardy enough to make discussion over them.

Judge Cushman readily perceived the vital point, and after referring to the language of section 11 of the ordinance he disposed of the argument thus (Record, p. 49):

> "It is now contended that this language contemplates only the failure to perform those affirmative duties imposed upon the grantee of the franchise by the terms of the ordinance; that, so far as those things forbidden to be done by the grantee are concerned—as was the

right to furnish electricity for lighting purposes—it was not intended that a forfeiture might be enforced, for such a violation; that injunctive relief in such a matter would afford an ample remedy.

"It may be conceded that such relief would be more appropriate and more nearly complete—to prevent the grantee's doing acts forbidden to it in the franchise than to compel the performance of those acts undertaken by it; but the language used shows no intent to limit the right of forfeiture as contended. One of the conditions of the franchise was that the grantee should, in no event, without a permit from the City, furnish electric power for lighting. True, the word 'perform', considered by itself, is more appropriate to express action than inaction; but when considered in the connection in which it was used:

'Perform any and all conditions of the ordinance specified and mentioned:'

it is clear that it contemplates both the doing and the not doing of those things required. In such connection it means the carrying out, or the fulfilling, of all conditions of the ordinance."

What more could be said?

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If there were anything in the point "V" in appellant's brief (p. 42), it would be completely answered by the Bell Telephone case, 103 Fed. 31. The Tacoma Railway & Power Company either obtained the franchise limited by the ordinance or it got no franchise at all. It is respectfully

submitted that every such assumption by the corporations which first beg for municipal franchises at any price until they obtain them, and then impudently set up and contend for a state of things which never existed or was intended to exist, should meet the same sort of rebuke.

The effort to argue the City out of its right to say who shall vend electric power in its streets on the theory of monopoly can certainly have little weight. As a general rule public utilities of all sorts are in fact monopolies, and they ought to be. For example, the Tacoma Railway & Power Company has an absolute monopoly of the street railway business in Tacoma. So has the Pacific Telephone & Telegraph Company of the telephone business. The people, through the Council, simply would not let any other concerns operate in the same fields. There is monopoly, if you like, but who can break it?

In *State ex rel. Telegraph Co. v. Spokane*, 24 Wash. 53, a telephone corporation attempted to compel the City of Spokane to grant it a franchise, and the same arguments about monopoly used there are here repeated. But the ruling was that merely because a franchise had been granted to one company did not make it a monopoly when the City refused another.

Appellant would have urged that because the City of Tacoma had undertaken to furnish electric

lights in its streets and to its inhabitants it must throw open the streets to any adventurer who could procure poles and buy current from some outsider, or be under the ban for monopoly.

But things are not so simply absurd.

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Under its point "VI." appellant seeks to place itself in a position of superiority, unwarranted by the facts.

The ordinance (Sec. 11) contained its own code of enforcement. Under it no resort to any court was necessary to forfeit the franchise or perfect the *title* to the property and the *right* to its possession. The only notice required was that provided for, viz: a thirty-day notice to the grantee and, perhaps, the passage of an ordinance or resolution.

Of course, if resistance had been offered a suit for possession might have been necessary, since, equally of course, force is no more available to a city than to a private person. And in such a suit the question of the legality of the forfeiture could be tried; or the Company could take any other legal step it deemed necessary to contest the forfeiture.

The only one of apellant's cases which gets anywhere near this one is *Wheeling R. R. Co. v. Triadelphia*, cited on p. 55 of the brief (52 S. E. 499). The forfeiture there discussed was under an ordi-

nance very much like this one and it was not sustained because there had been several years of acquiescence in the failure to keep the street in the condition contracted for, and there had been no such notice as the ordinance required, and the Company attempted to, and was willing and anxious to make a full compliance where there had been only a meagerly substantial one. At the foot of page 510 of the report, after lengthy discussion, the opinion ends thus:

> "If the injury could not be remedied, or *the railway company stood defiant, refusing to perform*, the case would wear a different aspect; but it does not. It is willing to perform to the letter—to pay to the last farthing."

But what was the attitude of the Tacoma Railway & Power Company? It refused to obey the warnings given in strict accord with the contract; asserted that it was not bound in any way to perform its solemn undertaking; went into court to prevent the action which the contract stipulated for; and, notwithstanding the demand of the City for a forfeiture, it continued its denial of obligation and made no proffer of compliance, even in the alternative, but by its reply reiterated its defiance. This course it continued in the Supreme Court of the State without ever once appealing to any equitable consideration.

And now after all this judicial happening comes appellant and with its shadowy excuse of

mortgagee's interest for innocent bondholders, appeals to *EQUITY!* Having stood by while its principal was waging its war of repudiation against the City, months after the repeal ordinance has been passed, it takes up the same weapons and renews the fight. It makes no offer to see that the Company quits the lighting business; on the contrary it demands that it shall be restored to the full possession of it. It does not want to comply with the contract; it demands that the most important part of it be obliterated.

A similar case is *Union St. Ry. Co. v. Snow*, (Mich.), 71 N. W. Rep. 1073. The company had failed to make street improvements or to pay the City the cost of the work it had done, and the Company sought to enjoin the removal of its tracks. The question was on the failure to pay, the excuse offered being that although large sums had been invested the business did not pay; but the court said it had no power to excuse performance, because the contract was plain, and the injunction was refused.

*City of Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171 (38 N. E. 384), is almost identical with this case in all its legal aspects. While the trustee of the mortgage was foreclosing and after a receiver of the street railway had been appointed, the City of Belleville passed an ordinance repealing the franchise and by interpleader in the foreclosure

proceedings asked to be allowed to remove the tracks. The decree supported the forfeiture against the mortgagee on the ground that the City had the right to the enforcement of the contract as made.

A similar case is *Pacific Railroad Co. v. Leavenworth*, 1 Dillon, 393; Federal cases, No 10649.

See, also, *Spokane St. Ry. Co. v. Spokane Falls*, 46 Fed. 322.

In the Leavenworth case Judge Dillon said:

> "Whether the things to be performed by the company are conditions subsequent, as claimed by the city, or mere covenants, as contended by the company, it is not perhaps material, on this application, to decide. This depends upon the intention; 4 Kent, Comm. 135, 136. And although courts incline against conditions, they will or should carry out the intention of the parties; and my opinion is that the parties here intended that the city should have the right to take possession on the failure of the company to keep its contract."

Such was the ruling of Judge Cushman here; and we submit that his ruling should be affirmed.

Respectfully,

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